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ADDENDUM: TAFT-HARTLEY AND STATE POWER TO REGULATE LABOR RELATIONS

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The article on this subject which appeared in the February, 1955 issue of the *Washington Law Review*[1] made reference to three cases which were then pending before the Supreme Court of the United States. Since that time the Court has handed down these decisions. Ordinarily this would not justify additional comment, for one of the risks in writing any article in such a dynamic field is that what appears to be current today may be rendered obsolete or incomplete tomorrow. However, since the subject matter is of continuing and developing importance to all lawyers interested in labor law, and since at least one of the predictions made as to the Court's possible behavior apparently turned out to be more venturesome than accurate, it seems appropriate to set forth these decisions.

Weber v. Anheuser-Busch, Inc.[2]

The case involved the following situation. The Machinists Union represented the machinists employed by a large St. Louis brewery. At a time when the contract was properly open for renegotiation, the Machinists went on strike in order to get the brewing company to agree that when it had need to expand its plant it would do business solely with building contractors who had entered into agreements whereby certain work would be done by members of the Machinists Union rather than by members of the Carpenters Union. The National Labor Relations Board dismissed the employer's charge that the Machinists' conduct violated section 8(b)(4)(D) of the Taft-Hartley Act, which prohibits jurisdictional-dispute strikes. However, the Board did not rule on the question of whether the strike constituted an illegal secondary boycott under sections 8 (b) (4) (A) or (B) of the federal Act because that issue was not presented to it.

In the meantime the company, after it had filed the charge with the Board but before the Board had acted upon it, initiated state court proceedings against the strike on the grounds, *inter alia*, that it constituted a secondary boycott in violation both of Missouri common law and sections 8(b)(4)(A) and (B) of the Taft-Hartley Act. More than a year after the Board dismissed the company's charge, the Missouri Supreme Court affirmed the lower court's injunction against the

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[1] 30 WASH. L. REV. 1-25 (1955).

[2] 348 U.S. 468 (1955).

strike on the ground that it constituted an illegal conspiracy in restraint of trade under a Missouri statute. In its opinion the Missouri court treated the Board's dismissal of the employer's charge as a holding that the allegation upon which the injunction issued could not be the basis of an unfair labor practice under the Taft-Hartley Act.

It was this decision which the United States Supreme Court reversed on writ of certiorari. The Court's opinion by Mr. Justice Frankfurter lays emphasis on the exclusive primary jurisdiction of the National Labor Relations Board.

It points out that the Board's dismissal of the employer's charge did not amount to a determination that the strike was not violative of Taft-Hartley in any respects. The Board's action meant only that the strike did not violate section 8 (b)(4)(D), leaving open the question of whether it constituted an illegal secondary boycott under sections 8(b)(4)(A) or (B). This open question is one which the Board, not the state court, is empowered to pass upon in the first instance. The state court could not, in advance of some Board action on this question, adjudge the controversy and extend its own form of relief.

As in *Garner v. Teamsters*,[3] the 1953 decision holding that where the conduct at issue falls within the prohibitions of the federal Act the NLRB has exclusive primary jurisdiction to pass on it, the Court is concerned with preserving the integrity of the centralized federal administrative procedure which Congress thought necessary for the uniform application of the statute's substantive rules so as to avoid local diversities and conflicts which might otherwise result.[4] The *Garner* opinion emphasized that it is the similarity of remedies, intended to prevent unfair labor practices and brought to bear on precisely the same conduct, that creates the danger of conflict and causes state jurisdiction to fail.

It follows, as the Court subsequently held in *Construction Workers v. Laburnum*,[5] that a state may hear and determine the issues in a common law tort action for recovery of damages caused by a union's violent conduct which is also a federal unfair labor practice, where the state remedy has no parallel in federal law.

[3] 346 U.S. 485 (1953).

[4] "The emphasis... is upon the primary jurisdiction of the Federal Board, *i.e.*, that when a federal question is, or even may be, involved, and Congress has set up a specialized agency to deal with it, then it is the legislative intent that such agency should get first crack at the problem, thereby permitting a uniform policy to be developed at the national level in interstate commerce, applicable throughout the country by whatever court or agency may seek to enforce it." Forkosch, *Jurisdiction and Its Impact on State Powers*, 16 OHIO STATE L. J. 301, 334.

[5] 347 U.S. 656 (1954).

Since the *Laburnum* case was inapposite, the plaintiff argued in the *Weber* case that the *Garner* doctrine was distinguishable on another ground—*viz.*, that the state was attempting to prevent restraints of trade rather than to regulate labor relations as such. The Court answered that it is immaterial "just what category of 'public policy' the union's conduct allegedly violated."[6] Such a broad formulation raises a question as to state power to reach by a remedy similar to the one afforded by the Taft-Hartley Act any union conduct which reasonably falls within the prohibitions of that statute, no matter what the basis for the state relief.

Thus, it may be offered as an explanation for the Court's subsequent denial of certiorari in *Mahoney v. Sailors' Union of the Pacific*,[7] in which the Washington court held that it did not have jurisdiction to award back wages to an employee whose wrongful expulsion from a union led to his exclusion from employment where it appeared that he might have obtained such relief from the NLRB.

It throws doubt on the power of the Washington court to follow the dictum of its recent opinion in *Baun v. Lumber & Sawmill Workers Union, Local 2740*,[8] in which it upheld state jurisdiction over a common law tort action for damages suffered as the result of a union's interference with a contract of employment, even though the tortious conduct also constitutes a federal unfair labor practice and is subject to redress by the NLRB.

And it even forms the basis for an argument that a state lacks power to reach by injunction union conduct involving threats of violence, breaches of the peace, etc., *e.g.*, organizational picketing set in such a context, where it may be subject to an NLRB cease and desist order.[9]

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[6] 348 U.S. at 480.

[7] 45 Wn.2d 453, 275 P.2d 444 (1954), *cert. den.*, 349 U.S. 915 (1955). Other courts have followed the Mahoney case. See, for examples, Real v. Curran, 285 App. Div. 522, 138 N.Y. Supp. 2d 809 (1st Dept. 1955) (Court granted reinstatement to union but refused damages measured by lost wages); Sterling v. Local 438, et al., ... Md. ....., 113 A.2d 389 (1955) (Court refused to award damages suffered by expelled plaintiff as a result of union's efforts to keep him from working in the trade.) *But see* United Auto Workers v. Ninz, 218 F.2d 664 (6th Cir., 1955).

[8] 46 Wn.2d 645, 284 P.2d 275 (1955). The court held that state court jurisdiction is proper in an action brought on a common law tort theory to recover damages from a union and certain officers and members thereof suffered as a result of their unlawful interference with the plaintiff's contract of employment which caused his discharge as a mill superintendent. (The allegation was that the company fired him in response to the union's threat to strike if it did not do so.) While the case was clearly distinguishable from either the Weber or Mahoney case because it did not appear that the plaintiff, a supervisory employee, had an NLRB remedy, the court did not stand on that ground alone. It also upheld state jurisdiction on the ground set forth in the text.

[9] Allen-Bradley Local 111 v. WERB, 315 U.S. 740 (1942), upheld state power to

However, there are narrowing features of the *Weber* case. First, on its facts, the case involves only the situation where there is a reasonable probability that the conduct, if not prohibited by the Taft-Hartley Act, is subject to its protection. The Court was heavily influenced by the fact that "even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the State was free to issue its injunction. If this conduct does not fall within the prohibitions of section 8 of the Taft-Hartley Act, it may fall within the protection of section 7, as concerted activity for mutual aid or protection."[10]

Moreover, the Court, after realizing that "it is not easy for a state court to decide... whether the subject matter is the concern exclusively of the federal Board... particularly... where the rulings of the Board are not wholly consistent on the meaning of the sections outlawing 'unfair labor practices,' and where the area of free 'concerted activities' has not been clearly bounded," [11] holds only that:

> ... [W]here the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections [of the NLRA] prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.[12]

Second, in both the *Garner* and *Weber* cases, the state enjoined striking or picketing on the basis of a judgment as to its effect on union organization and collective bargaining.[13] This is the type of

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enjoin mass picketing, threats of bodily injury and property damage, obstruction of streets and public roads, and the blocking of the entrance to a factory. However, since the decision came down prior to the time the NLRA provided for union unfair labor practices, no issue of primary jurisdiction was involved. Such conduct was not subject to regulation by the NLRB, either by prohibtion or protection. The Court's citation of the Allen-Bradley case with apparent approval in the Garner and Weber cases indicates that such restraints still are excepted from the pre-emption doctrine, and the recent denial of certiorari in Perez v. Trifiletti, ... Fla. ....., 74 So.2d 100 (1954), *cert. den.*, 348 U.S. 926 (1955), lends support to this thesis. (However, although there was evidence of violence in that case, there was no showing that the picketed employer whose employees brought the action to enjoin was engaged in interstate business.)

[10] 348 U.S. at 478, 479.

[11] 348 U.S. at 481.

[12] *Id.*

[13] This was true on the face of the decision in the Garner case where the lower state court enjoined the picketing because its objective was to force the employer to compel his employees to join the union. As to the state decision in the Weber case, see Cox, *Federalism in Labor Law*, 67 HARV. L. REV. 1297, 1327-28 (1954): "The slippery phrase 'unlawful objective'... covers not only (1) the purpose to induce an employer to engage in unlawful conduct, but also (2) bargaining demands which the employer may grant without violating any statute or precept of public policy but which the court

regulation in which conflict between state and federal procedures is most apt to arise because of the possibility that the NLRB would, if it had an opportunity to pass on the question, reach a different result. A Board holding, after appraising striking and picketing for purposes related to collective bargaining and union organization against the statutory language setting forth federal policy on such matters, that the union has not violated the Act does not necessarily mean that the conduct is sanctioned or protected by federal law. However, it may be supposed that the Board's determination ordinarily places the conduct within the area of labor combat designed by federal policy to be free and upon which the states may not impinge.[14]

Thus, the Court relies on the *Weber* case in its *per curiam* decision

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regards as beyond the required scope of bargaining or insufficient to justify the injury to the employer's business. Judicial opposition to concerted action in the second category is not based upon the employees' goal, therefore, but upon concertive action against the employer as a method of achieving it.... The purpose of NLRA section 7 was to immunize employees against this doctrine."

And at 1329-30: "The [state] decision [in the Weber case] seems inconsistent with the Garner case.... Every effective strike aimed at spreading union organization... results in *some* restraint of trade because it excludes the employer from the market until he yields. Unless the purpose or effect is to fix the market price to the detriment of the consumer, the legality of such a restraint depends upon a test of 'reasonableness'.... To judge the reasonableness of the restraint directly involves appraising the union's justification in terms of the effect on union organization and collective bargaining. The Anheuser-Busch opinion held the restraint unlawful on this ground.... Where the underlying issue is made to turn on balancing the interests of employers, employees, and unions in organizations or collective bargaining, the states should be no more free to apply anti-trust laws than statutes or court decisions avowedly based upon those considerations." See Anheuser-Busch v. Weber, 364 Mo. 573, 265 S.W.2d 325, 328, 333-34 (1954).

[14] "The detailed prescription [in the federal Act] of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. Garner v. Teamsters, 346 U.S. 485, 499-500 (1953). See the discussion of Hanke v. Teamsters, 33 Wn.2d 646, 207 P.2d 206 (1949) in 30 WASH. L. REV. 1, 14. George J. Bott, former NLRB General Counsel, suggested in a speech to the Ohio State Bar Association Convention, May 21, 1955, that the test is: Does the conduct at issue fall within a class of activity which Congress considered in drafting the Taft-Hartley Act?

After the decision in United Automobile Workers (AFL) v. WERB, 336 U. S. 245, 254 (1949), holding that "quickie" strikes are subject to state restraint "because the Federal Board has no authority either to investigate, approve or forbid" them, and prior to the dictum in the Garner case, *supra*, it was widely supposed that the states had jurisdiction to regulate conduct which is neither protected nor prohibited by the federal Act. For example, New York, while permitting organizational picketing for the purpose of inducing the employees to join the union, Wood v. O'Grady, 307 N.Y. 532, 122 N.E.2d 386 (1954), *cert den.*, 319 U. S. 774 (1955), has enjoined picketing for the purpose of forcing the employer to recognize the union as the exclusive bargaining representative of his employees in the absence of evidence of its majority status, Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 100 N.E.2d 697 (1951). The latter decision was grounded on the theory that state power can be exercised to restrain conduct which apparently is neither protected by Section 7 nor prohibited by Section 8. The validity of this theory is doubtful. The Weber case seems to require that a state court dismiss such a case in deference to the primary jurisdiction of the Board.

Equally doubtful, and for the same reason, is the recent decision in Milwaukee Boston Store Co. v. American Fed. of Hosiery Workers, 269 Wis. 338, 69 N.W.2d 762 (1955). The union had a wage dispute with two stocking manufacturers. It engaged in 'products'

in *General Drivers, etc. v. American Tobacco Co.*,[15] reversing a decision of the Court of Appeals of Kentucky which held, after examining NLRB doctrine, that while a union's picket line did not constitute an illegal secondary boycott, the state law which obliges common carriers to provide services to all customers without discrimination required the union's members who worked for a common carrier to cross the picket line and handle freight. The Kentucky court reached this result even though the agreement between the union and the carrier permitted employees to refuse to cross picket lines.

A state regulation of striking or picketing set in a context of violence and breaches of the peace is distinguishable on both points. Such conduct may under some circumstances violate the federal Act, but it is not protected or sanctioned by it. Moreover, local law lays hold of it without regard to the defendant's purpose. It is only an irrelevant happenstance, so far as liability is concerned, that the defendant is a trade union seeking to strengthen its organization or to strike a bargain with an employer on some matter.

A related line of analysis supports the dicta of the Washington court in the *Baun* case. Suppose a case where a union, for reasons unrelated to collective bargaining or the choice of a bargaining representative, *e.g.*, his opprobrious criticism of union officials or his efforts to change union election procedures, has caused an employee to lose his job or made it impossible for him to get another one, and he brings an action against it for the common law tort of malicious interference with his employment and prays for damages.[16] While the evidence

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picketing at the plaintiff's large retail store which sold these stockings. Finding the Garner case inapplicable because 'products' picketing, even though secondary in nature, does not violate the NLRA, the court held that it had jurisdiction to enjoin the conduct.

[15] 348 U.S. 978 (1955), *reversing* ..... Ky. ....., 264 S.W.2d 250 (1954). See also the Court's decision January 9, 1956, in Local Union No. 25 of Int'l Bro. of Teamsters etc. v. New York, N.H. & H. R.R. Co., ... U.S. ..... 76 S. Ct. 227 (1955), *reversing* 331 Mass. 720, 122 N.E.2d 759 (1954), and holding that the state did not have jurisdiction to issue an injunction in an action brought by a rail carrier against a union on the ground that the latter's picketing in Boston to prevent the former from placing loaded trailers onto flatcars for "piggy-backing" to other points in New England constituted a secondary boycott unlawful under both state law and the National Labor Relations Act. The Court reiterated and relied upon its holding in the Weber case.

[16] *Cf.* Mahoney v. Sailors' Union of the Pacific, 45 Wn.2d 453, 275 P.2d 440 (1954), *cert. den.*, 349 U.S. 915 (1955). Mahoney brought his case on the theory that his expulsion from the union was illegal and had resulted in interference with the property rights that inhere in union membership, including the right to follow a lawful vocation. He sought relief by way of an order setting aside his expulsion, directing reinstatement to the union, and awarding damages measured by lost wages. His evidence showed that he was an employee whose union membership had been terminated for a reason other than failure to tender periodic dues, and that the union had caused employers to discriminate against him in order to enforce its discipline. Since such conduct violates Section 8 (b) (2) of Taft-Hartley, the Washington court held that it lacked jurisdiction

shows that the plaintiff was not expelled from the union, there is a reasonable probability that the NLRB, if the case were before it, would find that the job discrimination was intended to encourage union membership and adherence to the obligations thereof, and hence that the defendant had violated section 8 (b)(2) of the federal Act.[17]

The *Weber* case does not, on its holding, foreclose the state from taking jurisdiction over the case. Such conduct, if not prohibited by the federal Act, cannot reasonably be deemed to be protected or sanctioned by it against state control. The NLRB, might, assuming that the case were brought to it first, dismiss the complaint on the ground that the union's conduct was intended only to punish the plaintiff for his political activities in the union and to discourage other members from doing likewise.[18] However, such a holding by the Board would hardly amount to a sanctioning of the union's conduct so as to foreclose state power to grant the employee a common law remedy in damages, unless the rather fanciful position were taken that the failure of the federal Act to regulate the internal affairs of unions manifests a national labor policy that they are to be free of any regulation.[19]

Nor would it seem that such union conduct, since it is not related to collective bargaining or union organization, is within the protection of section 7 as a form of concerted activity for mutual aid or protection.

However, and especially where the evidence seems to show clearly

to award him that item of relief, *i.e.*, back wages, which he could have obtained from the NLRB.

The Washington court surprisingly fails to mention the Mahoney case in its dictum in the Baun case. Because of many distinguishing factors it can hardly be supposed that the latter overrules the former *sub silentio*. However, in supporting its position the court followed Kuzma v. Millinery Workers Union, 27 N.J. Super. 579, 99 A.2d 833 (App. Div., 1953), a decision holding that a state has jurisdiction to grant compensatory and punitive damages in tort (wage losses, pain, humiliation, mental and emotional anguish and distress causing a permanent nerve disability that required medical care) to a union member who refused to contribute to a gift collection for a union official, lost her job because the union members refused to work unless the employer fired her, and was unable to obtain employment from other employers because of the defendant's conduct. The Washington court, by adopting the doctrine of the Kuzma case, suggests that it would have taken jurisdiction over Mahoney's claim arising from the interference with his employment opportunities if he had cast his law suit in the form suggested in the text.

[17] Expulsion from the union is not always an essential element in proving that Section 8(b)(2) has been violated. See Radio Officers' Union v. NLRB, 347 U. S. 17 (1954). *Cf.* Maxon Construction Co., Inc. and Bro. of Painters, etc., No. 437, 112 NLRB No. 62, 36 LRRM 1034 (1955).

[18] All of an employee's activities are not protected against job discrimination. For example, it is not an unfair labor practice for a union to cause an employer to fire an employee because of his misconduct on the job or his dissemination of Communist propaganda, even though his discharge was effected following his expulsion from the union. See Administrative Rulings of NLRB General Counsel, cases Nos. 71 and 72, March 30, 1951, set out in 27 LRRM 1510.

[19] See 30 WASH. L. REV. 1, 10, 12 (1955).

that the union's conduct violated section 8(b)(2), *e.g.*, the fact that the plaintiff was expelled before his discharge was sought, slips out during the plaintiff's proofs or is developed by the union in an effort to defeat state court jurisdiction, the question remains whether the state may award full compensatory relief, even though the plaintiff might have received redress from the NLRB for part of his harm, *e.g.*, back wages.[20] The discussion in the *Weber* opinion of the *Garner* decision and the Court's rejection as immaterial the category of state public policy upon which the local regulation is based suggest a negative answer.

However, the *Weber* case is not squarely in point, and the question appears to be open where the state remedy, despite partial and fortuitous overlapping with the NLRB remedy, is unrelated to the prevention of unfair labor practices; and where the question of whether it exists depends upon issues which are ordinarily unimportant to the Board. While a state court, in determining whether the conduct was tortious, would have to identify the union's objective and appraise it as a justification for the infliction of harm on the plaintiff, considerations of collective bargaining, the free choice of a bargaining representative by employees, or the strength of union organization against hostile employers and dual unions—the matters with which the NLRB is concerned—would be immaterial.[21]

On the other hand, if the plaintiff alleged unfair labor practices as the basis for his complaint—viz., grounded the law suit on his expulsion from the union and subsequent discrimination in employment, and prayed for relief which closely paralleled the administrative remedy which he might obtain from the NLRB, *e.g.*, reinstatement to employment or an order prohibiting the union from future interference with his employment, state jurisdiction would doubtless be precluded.[22]

[20] Mahoney v. Sailors' Union of the Pacific, 45 Wn.2d 453, 275 P.2d 440 (1954), *cert. den.*, 349 U. S. 915 (1955), is distinguishable from Kuzma v. Millinery Workers Union, 27 N.J. Super. 579, 99 A.2d 833 (App. Div., 1953), upon which the Washington court relies in the Baun case, because Mahoney was expelled from the union whereas Kuzma apparently (although the opinion does not say) was not. If the analysis developed in the text is correct, the distinction should not be controlling.

Nor would it seem to be significant that in Baun the union caused the plaintiff to lose his job whereas in Mahoney the union made it impossible for the plaintiff to get a job. The tort is generally recognized as embracing harm caused by malicious interference with advantageous relations, even though they are prospective, and in Kuzma the plaintiff complained not only that the union's conduct had cost her a job but also that it had made it impossible for her to find another one.

[21] See Comment, *The Supreme Court, 1954 Term,* 69 HARV. L. REV. 119, 177, 179 (1955).

[22] However, there would seem to be no objection to giving the plaintiff specific relief, *i.e.*, reinstatement, upon a showing that his wrongful expulsion from the union abridged other property rights that attach themselves to membership, *e.g.*, a death

Probably the best comments on the *Weber* case are found in the opinion itself. The Taft-Hartley Act "outlawed some aspects of labor activities and left others free for the operation of economic forces." Certain areas have been pre-empted in both categories. Other areas have been left open for state regulation. The "areas that have been pre-empted ... are not susceptible of delimitation by fixed metes and bounds ... [and] the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' This penumbral area can be rendered progressively clear only by the course of litigation."[23]

Amalgamated Clothing Workers v. Richman Bros.[24]

An issue related to the *Garner* and *Weber* cases arises when a state court issues an injunction against conduct which apparently is either prohibited or protected by the NLRA, and either the NLRB or the enjoined party seeks a federal decree staying its enforcement.

During the 1953-54 term the Supreme Court, in *Capital Service, Inc. v. NLRB*,[25] sustained the issuance of such relief under the exception to the prohibition of 28 U.S.C. § 2283 permitting a federal court to enjoin where "necessary in aid of its jurisdiction." However, on its facts the decision was limited to the situation where the NLRB had issued a complaint against the conduct which was the subject of the state decree and had successfully sought interlocutory federal relief under section 10 (1) of Taft-Hartley.

Dicta of the opinion suggested that such a result would follow in any situation where the NLRB had taken jurisdiction of the case and was the moving party.[26]

The *Capital Service* case left open the question of whether the federal courts have such power where the NLRB has not issued a complaint and relief is sought by the party against whom the state court proceedings have been brought—viz., whether a federal district court may enjoin an intrusion on the exclusive federal domain apart from the specific exceptions of section 2283. The Supreme Court

benefit, provided that the decree was formulated so as to protect these rights only. Ordering reinstatement with all rights and privileges of membership as a means of forcing the union to cease the unfair labor practice would, of course, run afoul of the pre-emption doctrines. See Mahoney v. Sailors' Union of the Pacific, 45 Wn.2d 453, 461-465, 275 P.2d 440, 445-447 (1954).

[23] 348 U.S. at 480-81.

[24] 348 U.S. 511 (1955).

[25] 347 U.S. 501 (1954).

[26] See NLRB v. NYSLRB, 106 F. Supp. 749 (S.D., N.Y., 1952). Compare Intl. Union of Electrical, etc. Workers (CIO) v. Underwood Corp., 219 F.2d 100 (2nd Cir., 1955).

gave a negative answer during the 1954-55 term in the *Richman Brothers* case, an action brought by a union to enjoin a corporation from further prosecution of its suit in state court against peaceful picketing. The Court also held that the exception to section 2283 which had been the basis for the decision in the *Capital Service* was inapplicable, as was the exception permitting a federal injunction to issue "as expressly authorized by act of Congress," for Taft-Hartley does not authorize private litigants to apply for such relief. The union's remedy is to appeal the state court decision.

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.[27]

The most important single issue arising under section 301 of Taft-Hartley is whether it merely provides a forum in which actions for breach of a collective bargaining agreement between an employer and a union may conveniently be brought or whether it also makes the parties *federally liable* for any loss, damage, or injury caused by a breach. Considerations of constitutionality push toward the latter interpretation, but legislative history seems to support the former. Moreover, a substantive interpretation of section 301 creates serious problems with respect to the applicability of state law to collective agreements in industries affecting commerce. It raises doubts as to the jurisdiction of state courts to enforce such agreements; and it may make a cause of action for breach removable even though it purports to be grounded entirely on state law and the federal courts lack jurisdiction to give the relief sought, *e.g.*, an injunction or specific performance of a promise to arbitrate.[28]

The question of the interpretation of section 301 was before the Supreme Court last term in the *Westinghouse* case, but the Court managed to dispose of the case on other grounds.

The case involved an action brought by a union under section 301 seeking a declaratory judgment that the collective agreement required the employer to pay some 4,000 employees for a particular day on which they did not work and a judgment for damages running in favor of the employees so entitled. The district court dismissed the complaint on the ground that it failed to state a cause of action.[29]

The majority of the Court of Appeals for the Third Circuit affirmed the dismissal, in a four to three decision, but on the ground that back

[27] 348 U.S. 437 (1955).
[28] See 30 WASH. L. REV. 1, 20-23 (1955).
[29] 107 F. Supp. 692 (W.D. Pa., 1952).

wage claims arise out of the employee's individual contracts of employment, not the collective bargaining agreement, and hence are not within federal court jurisdiction under section 301. The dissenting judges thought that the claim arose out of the collective agreement and that the union had a sufficient justiciable interest to be entitled to whatever remedy was necessary in order to protect group interests.[80]

Both the majority and the minority conceived of section 301 as creating a federal substantive right to enforce the terms of a collective bargaining agreement. And both applied federal law in resolving the substantive issue—viz., do the wage terms of a collective bargaining agreement create rights enforceable by the union which is a party to it? They differed only in their notions of the applicable federal rule.

The Supreme Court affirmed the dismissal in a six to two decision, Justices Warren and Clark joining in a brief concurring opinion, Mr. Justice Reed filing a separate concurring opinion, and Justices Douglas and Black dissenting in an opinion written by the former.

The judgment of the Court, announced in an opinion written by Mr. Justice Frankfurter (joined by Justices Burton and Minton), avoids the issue of whether section 301 is substantive or procedural. The opinion reasons on the basis of the language of the section and its legislative history that the latter interpretation is correct, with state substantive law governing enforcement of the contract.

However, Mr. Justice Frankfurter doubts that such an interpretation could survive constitutional attack because federal court jurisdiction over non-diversity cases can properly lie only when the case arises under a law of the United States, that is, when some aspect of federal law is essential to the plaintiff's success. Under broader federal question theory the "arising under" requirement of article III of the Constitution is satisfied if there is a contingent likelihood that a federal question will be presented, and a jurisdictional view of section 301 meets this test because there is always the possibility that the validity of the collective bargaining agreement will be challenged on federal grounds, *e.g.*, the union was not the representative of the employees involved. This would be enough, by analogy to situations involving federal corporations and trustees in bankruptcy, but Mr. Justice Frankfurter doubts that these precedents could be extended to meet the substantial difficulties encountered under section 301.

Since a substantive interpretation is at war with the statutory language and a jurisdictional interpretation raises serious questions of

[80] 210 F.2d 623 (3rd Cir., 1954).

constitutional validity, the opinion follows the "orthodox process of limiting the scope of doubtful legislation,"[31] and holds simply that Congress did not intend to burden the federal courts with suits based upon an employer's failure to comply with terms relating to compensation—terms peculiar in the individual benefit which is their subject matter.

Justices Warren and Clark agree with this conclusion, but give no clue as to whether they think section 301 is substantive or procedural.[32]

Mr. Justice Reed, on the other hand, while reaching the same result, adopts substantially the position of the majority of Third Circuit[33]—viz., that section 301 is substantive but that an employer's duty to pay wages to an employee arises from the individual contract of employment, not from the collective bargaining agreement.

Justices Douglas and Black also view section 301 as substantive,[34] the applicable federal rules for the construction and interpretation of agreements being drawn from federal statutes, state law, and other germane sources. But they argue that, by analogy to the NLRA, a union has standing under federal law not only to secure the employer's promises but also to enforce them, by law suit or otherwise.

While the *Westinghouse* decision leaves the basic issue for determination in another case, it makes the position of six members of the Court reasonably clear, leaving Justices Warren, Clark, and Harlan to decide the question. The decision also makes it clear that, no matter what interpretation section 301 is ultimately given, the states are free to enforce claims brought by individual employees based upon violations of the terms of the agreement that relate to compensation. Presumably this includes not only wage terms but all other compensation terms that are peculiar in the individual benefit which is their subject matter.[35] Indeed, it would seem that the states may permit a union to bring such an action.[36]

[31] 348 U.S. at 459.
[32] 348 U.S. at 461.
[33] 348 U.S. at 461-465.
[34] 348 U.S. at 465-468.
[35] See Int'l Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 221 F.2d 225 (9th Cir., 1955) (Action by union against employer for back wages owed an employee who allegedly was discharged wrongfully; dismissed on authority of Westinghouse case.)
[36] Compare Textile Workers Union et al. v. Textron, Inc., ... N.H. ..... 111 A.2d 823 (1955) (action by union against employer to recover back wages due numerous former employees for work performed by them; held that union may bring a bill in equity on behalf of the union members in the name of the business agent).
For a more extensive discussion of the Westinghouse case and the question of whether Section 301 is substantive or procedural, see Wollett and Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955).